

CRIMINAL APPEAL NO.6 OF 2001

Rafik Taksir,
s/o Mohammed Taksir,
r/o Cunchelim,
Near Football Ground,
N/o Sudan Purola District,
Gonda, U.P.

... Appellant.

versus

S T A T E

... Respondent.

Mr. Nitin Sardessai, Advocate for the Appellant.

Mrs. Winnie Coutinho, Additional Public Prosecutor for the State.

CORAM: P. V. HARDAS, J.

DATED: 9TH JANUARY, 2002.

ORAL JUDGMENT

The Appellant stands convicted for an offence punishable under Sections 376, 363 and 342 of the Indian Penal Code and is sentenced to suffer Rigorous Imprisonment for 7 years and to pay a fine of Rs.10,000/- in default Simple Imprisonment for 6 months, Rigorous Imprisonment for 1 year and to pay a fine of Rs.2000/- in default Simple Imprisonment for 1 month and to pay a fine of Rs.1000/- in default Simple Imprisonment for 1 month respectively, by the IInd Additional Sessions Judge, Panaji, in Sessions Case No.48 of 1999. It is this conviction and sentence which is assailed before me in the present appeal.

2. The facts necessary for the decision of the appeal are set out hereunder:-

On 31st March, 1999, a complaint, Exh.35, was filed by P.W.15, Babu Sab, complaining that his daughter Sheinaz Sheikh had gone to the school on 30th March, 1999 and did not return home till 12.00 in the afternoon. At about 2.00 p.m., he learnt from one ice-cream vendor by name Sashi that his daughter was seen going with the Appellant. He had gone to Pernem where the uncle of the Appellant resides and his daughter on being questioned had complained of being raped by the Appellant and hence, the complaint came to be filed. On receipt of the said complaint, P.W.16, Allan D'Sa, Police Inspector attached to the Mapusa Police Station registered the offence and directed P.S.I. Menezes to send the prosecutrix P.W.10, Sheinaz Sheikh, for medical examination. The offence was registered vide Crime No.81 under Sections 376, 363 and 342 of the Indian Penal Code. The Appellant was also arrested and sent for medical examination and he was examined by P.W.1, Dr. Silvano Sapeco. The medical reports in respect of the Appellant are at Exhs. 6 and 7. The urethral swabs and the smear slides were sent to the Serologist at Hyderabad by covering letter Exh.8. The blood sample of the Appellant was drawn for his blood groupings which was 'O'Rh positive as per the certificate Exh.9. P.W.10, Sheinaz Sheikh, was examined by P.W.3, Dr. Jimmy Paul. Her report of examination is at Exh.13 and the covering letter in respect of the vaginal swabs and smears is at Exh.14. On examination, P.W.3, Dr.

Jimmy Paul, found that the hymen had a fresh tear at 9 O'Clock position which was oedematous and bled on touch. P.W.3, Dr. Jimmy Paul, had collected the samples of the scalp hair, pubic hair and finger nail clippings. He opined that physical genital examination is suggestive of recent sexual intercourse. P.W.17, Braz Menezes, then proceeded to Pernem and recorded the scene of the offence panchanama in the presence of P.W.7, Stanley Braganza and one Umesh. The said panchanama is at Exh.20. A cream colour mat alleged to have been used by the Appellant was also attached. A white blouse and blue skirt alleged to have been worn by P.W.10, Sheinaz Sheikh, were also attached. A school bag containing writing pad and books of P.W.10, Sheinaz Sheikh, were also attached under a panchanama. P.W.17, Braz Menezes, then recorded the statements of the various witnesses and on receipt of the report of the Serologist which is at Exh.26 filed a charge-sheet in the Court. The learned Trial Judge vide Exh.3 framed a charge against the Appellant for an offence punishable under Sections 376, 363 and 342 of the Indian Penal Code. The Appellant abjured his guilt and claimed to be tried.

3. The prosecution in order to support its case examined in all 19 witnesses. P.W.10, Sheinaz Sheikh, is the prosecutrix. P.W.9, Muttu Laxmi, is the friend of P.W.10, Sheinaz Sheikh, in whose presence P.W.10, Sheinaz

Sheikh, had been taken by the Appellant. P.W.19, Narendra Kamat, has been examined to prove the date of birth of P.W.10, Sheinaz Sheikh, which is stated to be 16th September, 1983. P.W.17, Braz Menezes and P.W.16, Allan D'Sa, are the Police Officers who had conducted the investigation. P.W.18, Vinayak Alornekar, is the Special Judicial Magistrate who had recorded the statements of the witnesses under Section 164 of the Criminal Procedure Code. P.W.15, Babu Sab, is the father of P.W.10, Sheinaz Sheikh while P.W.14, Saiba Banu, is a resident of Mapusa from whom the Appellant purchased 6 to 7 sets of churidars for Rs.100/- each. P.W.13, Yar Mahamad, was declared hostile by the prosecution and cross-examined. P.W.12, S. G. Parab, is the draftsman working in the P.W.D. Works Division who on requisition Exh.28 had drawn the site plan which was sent to the Police along with the covering letter Exh.29 colly. P.W.11, N.R.K. Rao, is a Scientific Officer of C.F.S.L., Hyderabad, who had examined the articles sent to him and given his report at Exh.26. P.W.8, Chandrakant Harmalkar, was declared hostile by the prosecution and cross-examined. P.W.7, Stanley Braganza, is a panch witness on the scene of the offence panchanama at Exh.20. P.W.6, Suresh Kesarkar, was at the relevant time working as a waiter in Cafe Hanuman who identified the Appellant as the person who was in the company of a girl wearing school uniform. P.W.5, Ashraf Bi, is the mother of P.W.10, Sheinaz

Sheikh. P.W.4, Ramnarayan Pande, is an employer of the Appellant.

4. On consideration of the oral and documentary evidence, the learned Trial Judge came to a conclusion that the Appellant was guilty of the aforesaid offences of which he was charged and accordingly convicted and sentenced him. The Appellant has filed the present Appeal challenging his conviction.

5. This Court while considering the bail application of the Appellant pending the decision of the appeal, had asked the prosecutrix P.W.10, Sheinaz Sheikh, and her mother P.W.5, Ashraf Bi, to remain present in the Court. This Court while deciding Criminal Miscellaneous Application No.42 of 2001 at para 4 has observed thus:-

"When the prosecutrix and her mother were called in the Chamber to assess their consent, if any, for the marriage, it was revealed that both of them have expressed desire in favour of the wedlock between the prosecutrix and the accused. The mother of the prosecutrix expressed her desire that the prosecutrix marries the accused as she was satisfied that the accused was a suitable partner for the prosecutrix notwithstanding the incident of rape, for which he has been convicted and sentenced. A specific affidavit has been presented by the mother on 16th April, 2001 and it has been stated

therein that on considering the various aspects and more particularly the welfare of the prosecutrix, both the sides have decided in favour of the wedlock of the accused and the prosecutrix. This proposal also has the consent of the Almin Committee of the Masjid. The intentions of the mother seem to be bonafide and for the welfare of her daughter and prima facie, as at present, there is no reason to believe that the wedding proposal is only used as a rule to secure bail for the accused. Notwithstanding these observations, it would be necessary also to impose suitable conditions to ensure that the wedding ceremony is performed and the accused treats the prosecutrix as his wife in toto and the wedlock is not used as an alibi to get over the Order of conviction and sentence. Though such a plea was taken before the trial Court, the learned trial Judge has rightly turned down the same plea taken in defence only".

6. The Appellant was, therefore, released on bail pending the decision of his appeal. The bail was operative for a period of 6 months. I have also perused the affidavit which was filed by P.W.5, Ashraf Bi, mother of the prosecutrix P.W.10, Sheinaz Sheikh. Thereafter, the Appellant filed Miscellaneous Application No.128 of 2001 praying for extension of bail on the ground that the prosecutrix P.W.10, Sheinaz Sheikh, had attained majority on 16th September, 2001 and, therefore, the Appellant could not solemnize the marriage with P.W.10, Sheinaz Sheikh. It is stated that the Appellant had solemnized his marriage with P.W.10, Sheinaz Sheikh, on 12th

October, 2001. The affidavit of P.W.10, Sheinaz Sheikh, was also annexed with the said application in which P.W.10, Sheinaz Sheikh, has reiterated the factum of marriage with the Appellant.

7. In the background of the fact that the Appellant and the prosecutrix P.W.10, Sheinaz Sheikh, had got married on 10th October, 2001, it is urged before me by the learned Advocate appearing for the Appellant that a lenient view in respect of sentence may be taken. According to the learned Advocate appearing for the Appellant in view of the marriage, the sentence of 7 years imprisonment would be extremely harsh and whatever little the Appellant had done to alleviate the humiliation, pain and suffering of P.W.10, Sheinaz Sheikh, be set at naught if the sentence is confirmed. The learned Advocate appearing for the Appellant has also placed reliance on a Judgment of the Supreme Court in the matter of **Sultan Singh v. State of M.P.** reported in 1990 (Supp) SCC 635 which reads thus;

"Special leave granted limited to the question of sentence only. Having regard to the several features of this case including the fact that the appellant has married the prosecutrix as stated by the learned counsel for the appellant, we feel that the sentence imposed on the appellant should be reduced to the sentence of imprisonment already undergone by him. We accordingly modify

the judgment of the High Court insofar as the question of sentence is concerned. The appeal is disposed of accordingly."

8. Relying on this Judgment, it is, therefore, submitted that the Appellant be released on the period of imprisonment which he has already undergone. The Appellant was arrested on 31st March, 1999 and released on bail on 17th May, 1999. Thereafter, the Appellant was in custody after his conviction from 22nd November, 2000 to 17th April, 2001. The learned Advocate appearing for the Appellant states that though this Court had granted bail to the Appellant pending the decision of the appeal on 17th April, 2001, the Appellant was in fact released on 20th April, 2001. Thus, the Appellant has already undergone 6 1/2 months of imprisonment.

9. Mrs. Winnie Coutinho, the learned Additional Public Prosecutor appearing for the State has urged that though the Appellant and P.W.10, Sheinaz Sheikh, are stated to be husband and wife, the sentence of 6 1/2 months is inadequate qua the offence committed by the Appellant.

10. After taking into consideration the rival submissions of the learned Advocates appearing for the parties, I am of the considered view that since the Appellant and P.W.10, Sheinaz Sheikh have solemnized their marriage on 10th October, 2001, it would not be

proper at this stage to ask the Appellant to undergo the sentence of 7 years Rigorous Imprisonment. It is true that the scars of the trauma suffered by P.W.10, Sheinaz Sheikh, can never be erased from her memory but the evidence on record does indicate to a certain extent that the Appellant and P.W.10, Sheinaz Sheikh, were in love. The Appellant and P.W.10, Sheinaz Sheikh have now solemnized their marriage and are staying as husband and wife. In view of this, in the fitness of things, it would not be proper to ask the Appellant to serve out his sentence.

11. The learned Advocate appearing for the Appellant further states that the Appellant shall invest an amount of Rs.10,000/- in Fixed Deposit in the name of his wife P.W.10, Sheinaz Sheikh.

12. In the result, therefore, the conviction of the Appellant for an offence punishable under Sections 363, 342 and 376 of the Indian Penal Code is hereby maintained. The sentences awarded by the learned Trial Judge are hereby set aside and it is directed that the Appellant shall be released on the period of imprisonment already undergone by him which is stated to be 6 to 7 months. With this modification in sentence, the appeal

is partly allowed. The Bail Bonds of the Appellant stands cancelled.

(P. V. HARDAS)
JUDGE

RD.